COURT OF APPEALS
DECISION
DATED AND FILED

November 22, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP3168 **2005CV1050**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

ACUITY, A MUTUAL INSURANCE COMPANY, AND MACHINE TOOL SPECIALIST, INC.,

PLAINTIFFS-APPELLANTS,

V.

PARTNERS MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Reversed and cause remanded.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 NETTESHEIM, J. In this subrogation case, Acuity, A Mutual Insurance Company (Acuity), appeals from the grant of a declaratory judgment[1] to Partners Mutual Insurance Company (Partners), the insurer of Waukesha Ironworks (Ironworks). Acuity claimed that it was entitled to subrogation from Partners because an Ironworks employee damaged a forklift owned by Acuity's insured. The circuit court held that Partners had no duty to defend or indemnify Ironworks or its employee based on an exclusion in the inland marine coverage portion of the Partners policy. Acuity contends, and we agree, that coverage is provided under the commercial general liability (CGL) coverage of the Partners policy. We reverse and remand for further proceedings.

BACKGROUND

¶2 The facts are undisputed. Acuity provided a property insurance policy to Machine Tool Specialist, Inc. (MTS). MTS is in the business of, among other things, rebuilding and hauling industrial machinery. The incident at issue occurred on the grounds of Western Metal Specialty, an area manufacturer that had auctioned off its equipment. The various buyers engaged MTS and other contractors to dismantle and move the equipment purchased at auction. The contractors used their own machinery in this endeavor, and MTS brought its own forklift to the site. Because the job continued for some time, heavy equipment generally was left on-site during the project. MTS secured its forklift each night with a heavy chain and padlock. Upon arriving at the Western Metal job site one morning, the MTS foreman observed some damage to the forklift and found that a

[1] As is common in insurance coverage disputes, Partners Mutual Insurance Company moved for a declaratory judgment pursuant to WIS. STAT. § 806.04 (2003-04), not summary judgment as appellants state.

link in the chain had been cut. MTS's owner determined that the forklift had been overloaded, causing the forks to sustain nearly $26,000 in damages.

¶3 Ironworks, Partners' insured, was another of the contractors at the Western Metal site. Jon Stier is an owner of Ironworks. Stier admitted that he cut the chain on the forklift, used his own ignition key to start the forklift,[2] used the forklift without MTS's permission to accomplish a task related to his own work, and damaged the forklift while using it. Acuity paid MTS for the forklift repairs pursuant to the insurance policy it had issued to MTS. MTS filed the instant action against Stier, Ironworks and Partners. The complaint alleged negligence and negligent supervision claims against Stier and Ironworks, and a subrogation claim against Partners.

¶4 At the time of the incident Ironworks was insured by a Commercial Insurance Policy issued by Partners. Although one document, the policy provided three discrete categories of coverage: commercial property coverage, commercial inland marine coverage, and commercial general liability coverage. Partners moved for a declaratory judgment, contending that its policy did not afford coverage and therefore Partners had no duty to defend Ironworks or Stier. Partners argued in its supporting memorandum that under the terms of its policy MTS's forklift was not "covered property" or, even if it was, coverage was unavailable for criminal, fraudulent, dishonest or illegal acts, which encompassed Stier's unauthorized use of the forklift. After oral arguments, the circuit court

[2] The owner of MTS testified that forklift keys are virtually interchangeable, with one key fitting "probably 90 percent of the forklifts on the market."

granted Partners' motion, ruling that the dishonest acts exclusion in the inland marine coverage barred Acuity's subrogation claim. Acuity appeals.

DISCUSSION

¶5 The question on appeal is whether the circuit court correctly declared that the Partners policy provides no coverage for the damaged forklift. Acuity submits that the circuit court erroneously looked to the inland marine coverage when it declared that coverage did not exist, rather than to the CGL coverage which provides liability coverage for damage to the property of third parties.

¶6 Whether to grant a declaratory judgment is addressed to the circuit court's discretion. ***State Farm Fire & Cas. Co. v. Acuity***, 2005 WI App 77, ¶6, 280 Wis. 2d 624, 695 N.W.2d 883. But when the exercise of that discretion turns on the interpretation of an insurance policy, a question of law, we review the question without deference, applying the same rules of construction we apply to contracts generally. ***Id.*** In addition, the intent of parties to an insurance contract governs its construction. *See* ***Dieter v. Chrysler Corp.***, 2000 WI 45, ¶15, 234 Wis. 2d 670, 610 N.W.2d 832. Partners contends that if Ironworks had intended to purchase more extensive property coverage, it could have done so, and Partners should not now be asked to provide coverage for a risk for which it was not paid a premium.

¶7 To determine whether coverage exists for a claim, we first look to whether the insuring agreement makes an initial grant of coverage. ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶24, 268 Wis. 2d 16, 673 N.W.2d 65. If it does, we then determine whether coverage is defeated by any of the various exclusions. ***Id.*** In the trial court, Acuity steadfastly maintained that

only the CGL coverage made an initial grant of coverage. The circuit court concluded, however, that coverage existed under the inland marine part, but then was negated by the exclusion in that part for "criminal, fraudulent, dishonest or illegal acts."

¶8 Partners goes further here on appeal. It marches us through virtually the entire insurance policy in an effort to show how the forklift might find an initial grant of coverage under the commercial property coverage and the inland marine coverage, which are then limited or precluded by one policy term or another. For instance, Partners contends that under the commercial property coverage the forklift would be covered as "personal property of others" in the "care, custody or control" of Ironworks, even though "at a location [Ironworks] do[es] not own, lease or operate." Likewise, Partners asserts that the inland marine coverage similarly provides coverage for damage to "equipment of others in [Ironworks'] care, custody or control," unless, among other things, the loss results from "criminal, fraudulent, dishonest or illegal acts."

¶9 Partners' excursion through the various policy provisions might be relevant if the question were whether under some scenario Ironworks itself wished to pursue a property damage claim for the forklift. At issue here, however, is whether coverage exists where Ironworks negligently damaged the property *of a third party*. In other words, the issue is not whether the damage to *MTS's forklift* is initially covered under Partners' inland marine coverage and/or commercial property coverage and then excluded. Rather, the issue is whether *Ironworks' liability* for the damage to the forklift, an item of property owned by a third party, is covered under the Partners policy, particularly the CGL coverage.

¶10 The inland marine coverage of the Partners policy covers "direct physical loss" to Ironworks' equipment and to the equipment of others that is in Ironworks' "care, custody, or control." The coverage is limited to equipment "described on the 'declarations.'" However, the declarations page understandably does not list MTS's forklift since Ironworks could hardly be expected to list the equipment of a third party. Thus, there is no initial grant of coverage under the inland marine coverage.[3] There being no initial grant of coverage in the inland marine coverage, the trial court erred in taking the next step and determining that coverage was precluded under the inland marine's "dishonesty" exclusion.

¶11 We therefore turn to the CGL coverage, looking first to the insuring agreement. *See* ***id.***, ¶24. Here, the CGL coverage plainly promises that Partners "will pay those sums that the insured becomes legally obligated to pay as damages because of … 'property damage' to which this insurance applies." Partners nonetheless contends that there is no initial grant of coverage, asserting that Stier is not an insured because, under sec. II2.a.(2)(b) of the policy, employees are not insureds for property damage to property "in the care, custody or control of, or over which physical control is being exercised for any purpose by [Ironworks or] any of [Ironworks'] employees."

¶12 We reject this argument. Regardless of whether this section of the policy excludes Stier, it does not exclude Ironworks. Ironworks is the named insured, yet Partners either ignores or misapprehends the negligent supervision claim made against Ironworks. Negligent supervision is not to be confused with

[3] There also is no initial grant of coverage under the commercial property coverage because, as explained *infra*, MTS's forklift was not in Ironworks' "care, custody or control."

the vicarious liability under *respondeat superior*. *See* ***Doyle v. Engelke***, 219 Wis. 2d 277, 291 n.6, 580 N.W.2d 245 (1998). While negligent supervision does require an underlying wrong to be committed by the employee as an element, the tort actually focuses on the tortious conduct of the employer. ***Id.*** We conclude that the CGL insuring agreement provides an initial grant of coverage.

¶13 We next must determine, therefore, whether coverage is defeated by any of the various exclusions. ***American Girl***, 268 Wis. 2d 16, ¶24. Partners posits that the "Expected or Intended Injury" and "Damage to Property" exclusions relieve it of liability. We see it differently. The "Expected or Intended Injury" exclusion, or intentional acts exclusion, *see* ***Loveridge v. Chartier***, 161 Wis. 2d 150, 168, 468 N.W.2d 146 (1991), excludes coverage for property damage "expected or intended from the standpoint of the insured." That exclusion simply does not apply under these facts. The injury MTS incurred was the damaged forklift, not its unauthorized use. Therefore, although Stier's deliberate actions demonstrate that he intended to appropriate the forklift, nothing in the evidence suggests that he or Ironworks intended some harm or injury to follow or knew it was substantially certain to follow. *See* ***id.***

¶14 We also reject Partners' argument that the "Damage to Property" exclusion relieves it of liability. This provision excludes coverage for property damage to "[p]ersonal property in the care, custody or control of the insured." We disagree that the forklift was in Stier's or Ironworks' "care, custody or control" within the meaning of this language. Stier accessed the forklift without MTS's knowledge or consent. He used his own ignition key after cutting through a heavy-duty chain clearly meant to thwart unauthorized users. The "care, custody or control" exclusion is not applicable if both proprietary and possessory control of the property remain in a third party rather than with the insured, or in the case

of a person who has no legal right to control at all. 43 AM. JUR. 2D *Insurance* § 695 (2003). Regardless of whether in this instance the forklift related to Stier's and Ironworks' essential work, we construe "care, custody or control" exclusions against the insurer, and hold that it does not operate to exclude coverage. *See* ***Silverton Enters. v. General Cas. Co.***, 143 Wis. 2d 661, 670, 671, 422 N.W.2d 154 (Ct. App. 1988).

¶15 Partners advances a number of other lesser arguments as to why it should escape liability for the loss. None are persuasive. The very purpose of a CGL policy is to protect the insured against liability for damages the insured's negligence causes to third parties. ***Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.***, 2000 WI 26, ¶27, 233 Wis. 2d 314, 607 N.W.2d 276. The risk meant to be insured in a CGL policy is tort liability for physical damages to others. ***Bulen v. West Bend Mut. Ins. Co.***, 125 Wis. 2d 259, 265, 371 N.W.2d 392 (Ct. App. 1985). That is the very situation here should a fact finder decide that Ironworks is legally liable for the forklift damage. In that event, Partners must honor the contract by covering the risk for which Ironworks paid a premium.

¶16 Finally, we observe that if an insurance policy bars coverage for a loss in one provision, but confers coverage in another, the law deems the loss covered. *See* ***Lee & Assocs., Inc. v. Peters***, 206 Wis. 2d 509, 526, 557 N.W.2d 457 (Ct. App. 1996) ("The pollution exclusion clause in Coverage A of Integrity's commercial property policy does not bar coverage under the CGL property damage provision of the products/completed operation form."). Thus, even if we were to allow that the inland marine provisions of the Partners policy barred coverage, it remains that the CGL provisions confer coverage.

¶17 There is a public policy in Wisconsin against the avoidance of coverage by an insurer, and the reasonable expectations of coverage by an insured should be honored. ***Patrick v. Head of the Lakes Coop. Elec. Ass'n***, 98 Wis. 2d 66, 69, 295 N.W.2d 205 (Ct. App. 1980). Ironworks purchased liability coverage for tort damages to third parties. Because none of the exclusions work to defeat coverage, we reverse the declaratory judgment.

By the Court.—Judgment reversed and cause remanded.

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